

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT GEORGIA
ATLANTA DIVISION

In re:)	Chapter 11
)	
ROHRIG INVESTMENTS, LP, <i>et al.</i> ,)	Case No. 13-53483-bem
)	(Jointly Administered)
Debtors.)	
)	
RREF BB ACQUISITIONS, LLC,)	
)	
Movant,)	
)	CONTESTED MATTER
v.)	
)	
431 W. PONCE DE LEON, LLC,)	
ROHRIG INVESTMENTS, LP,)	
ROHRIG POLLAC, LLC,)	
CARTEL PROPERTIES II, LLC,)	
CARTEL PROPERTIES SPALDING)	
WOODS, LLC and)	
525 MORELAND AVENUE, LLC,)	
)	
Respondents.)	
)	
)	

**RREF BB ACQUISITION, LLC'S
AMENDED MOTION FOR APPOINTMENT OF A CHAPTER 11 TRUSTEE
AND REQUEST FOR EXPEDITED HEARING ON AUGUST 19, 2014 AND JOINDER
IN THE UNITED STATES TRUSTEE'S MOTION FOR APPOINTMENT OF TRUSTEE**

RREF BB Acquisitions, LLC ("RREF" or "Rialto"), a creditor of Debtors, files this, its Amended Motion for Appointment of a Chapter 11 Trustee¹, seeking appointment of a chapter 11 trustee pursuant to 11 U.S.C. § 1104(a)(2), and joins in the United States Trustee's Motion for Appointment of a Chapter 11 Trustee (Doc. No. 867) showing the Court as follows:

¹ The facts, allegations and arguments in RREF's Motion for Appointment of a Chapter 11 Trustee (the "Motion", Doc. No. 87) are incorporated by express reference herein.

INTRODUCTION

These bankruptcy cases have been pending for over 18 months, with the Court having recently entered an order denying confirmation of the dueling full-payment plans proposed by Debtors and RREF. During the pendency of these cases and in the months leading up to their filing, Debtors have been at war with RREF, their largest creditor. These proceedings have been enormously expensive for Debtors, RREF and Debtors' other creditors, with Debtors and RREF having incurred attorneys and expert fees and expenses in excess of \$2.7 million since the petition date. If the parties are permitted to amend their plans, the fees associated therewith will be substantial and will likely absorb whatever equity is available for Debtors' creditors and equity holders, resulting in likely stay relief to RREF. Appointment of a trustee is appropriate under 11 U.S.C. § 1104(a)(2) where, as here, severe acrimony exists between the parties and mounting litigation costs threaten to unduly consume resources that would otherwise be available for distribution to creditors. *See In re Int'l Realty Dev. Partners, Ltd.*, A98-63901-ADK, Doc. No. 93 at 7 (Bankr. N.D. Ga. 1998) (Kahn, J.) ("appointment of a Trustee is appropriate where conflict between the creditors and the debtor has extended beyond the healthy conflicts that always exist between debtor and creditor"; appointing a chapter 11 trustee after denying approval of debtor's disclosure statement) (*quoting In re Marvel Entm't Grp., Inc.*, 140 F.3d 463, 472 (3d Cir. 1998)).² Accordingly, the Court should appoint a trustee pursuant to section 1104(a)(2) to resolve the many contentious issues in these cases and bring these cases closer to a conclusion.

² A copy of the *Int'l Realty Dev. Partners* opinion is attached hereto as Exhibit A.

JURISDICTION AND VENUE

1. This Court has subject matter jurisdiction over this Motion pursuant to 28 U.S.C. §§ 157 and 1334. This matter is a core proceeding pursuant to 28 U.S.C. § 157(b). Venue is proper in this Court pursuant to 28 U.S.C. § 1409.

FACTUAL BACKGROUND

I. Description of Debtors and Debtors' indebtedness

2. On February 19, 2014, Debtors filed chapter 11 petitions commencing these bankruptcy cases.

3. As of May 2014, RREF estimated that it was owed \$12,273,464.44 in principal, plus interest, fees and costs for a total claim, before consideration of its section 506(b) claim, of \$15,037,490.27. (Doc. No. 856 at 4.) George Rohrig (“Rohrig”), Debtors’ managing member, is indebted to RREF pursuant to a Final Consent Judgment in the amount of \$19,971,632.45 entered on January 25, 2013 by the Superior Court of Fulton County.

4. Cartel Properties II and Rohrig Investments have secured creditors in addition to RREF. (Doc. No. 856 at 4-5.) Debtors scheduled approximately \$16 million in unsecured claims. (Doc. No. 856 at 5.) Those unsecured claims include over \$1.2 million owed by Debtors to Cartel Properties and \$9,067,962 owed by Rohrig Investments to Rohrig. There are no non-family partners that have an interest in the Debtor entities. (*Id.* at 3.) Each of the Debtors is managed by Rohrig through Cartel Properties, Inc. (“Cartel Properties”) (Doc. No. 856 at 2.) At present, Cartel Properties manages 30 to 40 LLCs for Rohrig, which includes Debtors’ properties. (*Id.*) Cartel Properties presently receives a monthly management fee from the Debtors in the amount of \$15,986. (Doc. No. 816 at 12.)

II. The Plans, Proceedings and the Parties Fees and Expenses

5. Debtors filed their initial plan of reorganization on August 20, 2013. (Doc. No. 268.) On November 11, 2013, Debtors filed a First Amended Plan of Reorganization (Doc. No. 351) and on December 18, 2013, Debtors filed their First Amended Joint Plan of Reorganization. (Doc. No. 390.)

6. RREF filed its Plan of Liquidation for Each Debtor on December 3, 2013, which was subsequently amended. (Doc. Nos. 371, 389, 402, 463, 762, 787.) The plans proposed by Debtors and RREF proposed to pay all secured and general unsecured claims in full.

7. Beginning on March 26, 2014, the Court heard eight days of testimony in connection with the confirmation of the competing plans proposed by Debtors and RREF.

8. On August 11, 2014, the Court issued its Order denying confirmation of the plans proposed by Debtors and RREF. (Doc. No. 856.)

III. The Contentious Proceedings and Parties' Fees and Expenses

9. In its Order denying confirmation, the Court acknowledged the contentious nature of these proceedings:

The Court notes that Debtors assert that Rialto's proposed treatment of insiders smacks of bad faith while Rialto implies that Debtors failure to liquidate more property is in bad faith. This has been a contentious case with parties who very clearly believe the other has bad motives. These general feelings and bad blood

(Doc. No. 856 at 17 n.14.)

10. The Court also acknowledged that "the parties have spent vast amounts of time, effort and money" (Doc. No. 856 at 59.)

IV. The Motions to Appoint a Chapter 11 Trustee

11. On April 17, 2013, RREF filed its Motion seeking the appointment of a chapter 11 trustee. (Doc. No. 87.) The Motion remains pending.

12. On May 8, 2014, Robin C. Loudermilk and The Knuckle Partnership, LLLP filed their Post-Confirmation Brief wherein they requested that, if the Court declines to confirm either plan, that the Court appoint a chapter 11 trustee pursuant to 11 U.S.C. § 1104(a)(2) given the contentious nature of these proceedings and because appointment of a trustee is in the best interests of creditors, equity holders and other interests of the estate. (Doc. No. 798.)

13. In the Court's order denying confirmation of the plans, the Court set a hearing for August 19, 2014 to consider, *inter alia*, whether a chapter 11 trustee should be appointed. (Doc. No. 856 at 59.)

ARGUMENT

I. The Court shall appoint a trustee for cause or if such appointment is in the best interests of creditors and may make such appointment *sua sponte*

14. Section 1104(a) of the Bankruptcy Code provides that the shall appoint a trustee for cause or if such appointment is in the best interests of creditors:

At any time after the commencement of the case but before confirmation of a plan, on request of a party in interest or the United States trustee, and after notice and a hearing, the court shall order the appointment of a trustee –

(2) If such appointment is in the interests of creditors, any equity security holders, and other interests of the estate

11 U.S.C. § 1104(a).

15. The Bankruptcy Code's use of the word "shall" means a court is required to appoint a trustee if it finds that (a)(1) or (a)(2) applies. *See In re Intercat, Inc.*, 247 B.R. 911,

920-21 (Bankr. S.D. Ga. 2000); *see also In re Wings Digital Corp.*, 2005 WL 3789334, *5 (Bankr. S.D.N.Y. 2005) (noting that section 1104(a)(2) is a “lesser standard” than section 1104(a)(1)). Whether to appoint a trustee is within the Court’s discretion. *See In re Adelphia Commc’ns Corp.*, 336 B.R. 610, 655-66 (Bankr. S.D.N.Y. 2006). The standard under section 1104(a)(2) is flexible. *In re Sharon Steel Corp.*, 871 F.2d 1217, 1226 (3d Cir. 1989). Where a fiduciary is “plainly necessary” appointment of a trustee is indicated. *In re Stratesec, Inc.*, 324 B.R. 158, 160 (Bankr. D.D.C. 2004).

16. Section 105(a) of the Bankruptcy Code authorizes the Court to appoint a chapter 11 trustee *sua sponte*. *See In re Bibo, Inc.*, 76 F.3d 256, 258 (9th Cir. 1996) (holding that the bankruptcy court was authorized to appoint a trustee *sua sponte*); *First Am. Healthcare of Ga., Inc. v. U.S. Dept. of Health & Human Svcs.*, 208 B.R. 992, 994 (Bankr. S.D. Ga. 1996) (“the court clearly has the authority *sua sponte* [under section 105] to order appointment of a trustee”).

17. Because the proceedings giving rise to RREF’s request for the appointment of a trustee pursuant to section 1104(a)(2) occurred before this Court, the Court can take judicial notice of such facts such that no evidentiary hearing is required or necessary.

II. Appointment of a trustee under section 1104(a)(2) is in the best interests of creditors and the estate

18. Section 1104(a)(2) provides that the Court shall appoint a trustee where such appointment is in the best interests of the creditors and the estate. The decision whether to appoint a trustee under section 1104(a)(2) may depend on an economic cost-benefit analysis. *In re Sundale, Ltd.*, 400 B.R. 890, 901 (Bankr. S.D. Fla. 2009). Whether to appoint a trustee under 1104(a)(2) does not, however, require a finding of fault by the debtors. *Id.*

19. Appointment of a trustee is appropriate under section 1104(a)(2) where, as here, severe acrimony exists between the parties and/or mounting litigation costs threaten to unduly

consume resources that would otherwise be available for distribution to creditors. *Int'l Realty Dev. Partners*, Doc. No. 93 at 7; *In re Basil St. Partners, LLC*, 477 B.R. 856, 869 (Bankr. M.D. Fla. 2012) (appointing a trustee where “both factions have exhibited a willingness . . . to spend seemingly limitless sums on attorneys’ fees in order to prolong their litigation in the hope of gaining the upper hand for ownership or control of the Debtor. A chapter 11 trustee comes with none of the attendant biases of the warring factions.”).

20. Judge Kahn’s decision in *International Realty Development Partners* (“IRDP”) is particularly instructive with respect to this case.³ In *IRDP*, the debtor owned two parcels of undeveloped real property. (Ex. A at 1). After a series of failed joint ventures entered with the intent to develop the property, the debtor was faced with imminent foreclosure and filed a chapter 7 case. *Id.* at 2. Once in bankruptcy, the chapter 7 trustee arranged for the property to be sold. *Id.* at 3. While the sale was pending, the debtor engaged new counsel and converted its case to chapter 11, thereby cancelling the trustee’s proposed sale. *Id.* The debtor filed a proposed chapter 11 plan and disclosure statement after conversion. *Id.*

21. In response, one of the debtor’s ex-partners in one of the failed joint ventures, who was also a creditor in the case, alleged bad faith in the conversion of the case and requested re-conversion to chapter 7 or, in the alternative, appointment of a chapter 11 trustee. *Id.* All secured creditors objected to the proposed plan and disclosure statement. *Id.*

22. After holding that the plan was not confirmable on a variety of grounds, including a lack of feasibility and violation of the absolute priority rule, Judge Kahn held that appointment of a chapter 11 trustee was necessary. *Id.* at 7-9. Specifically, he held that a trustee would work to the benefit of *both* creditors and equity holders because (i) “acrimony amongst the parties

³ A copy of the IRDP opinion is attached hereto as Exhibit A.

exceed[ed] the normal level of inherent conflict that typically exists in bankruptcy cases; (ii) creditors expressed a lack of confidence in the debtor's ability to reorganize and (iii) the estate was threatened with depletion "resulting from endless litigation that is incapable of settlement due to the acrimony between the parties." *Id.* at 8; *see also Marvel Entm't Grp.*, 140 F.3d at 472 (affirming appointment of a trustee where "the Debtors and the Lenders have flung accusations at each other, and have failed to demonstrate any ability to resolve matters cooperatively" and "the level of acrimony found to exist [] certainly makes the appointment of a trustee in the best interests of the parties and the estate."); *In re Shubh Hotels Pittsburgh, LLC*, BR 10-26337 JAD, 2011 WL 7145601 (Bankr. W.D. Pa. Feb. 1, 2011) (appointing a trustee, stating that "without the interjection of a neutral third party, it [was] clear to the Court that litigation costs [would] bury [the] case in the absence of a change of direction.").

23. Finally, the Court's recent opinion denying confirmation of both plans tips the scales in favor of appointing a neutral trustee. *See In re Sundale, Ltd.*, 400 B.R. 890, 912-13 (Bankr. S.D. Fla. 2009) (declining to appoint a trustee but holding that "if the Debtors are unable to confirm the Joint Plain, then the scales tip the other way, and appointment of a trustee will be in the interests of creditors, any equity security holders, and other interests of the estate.")

24. Given that the Court denied confirmation of the plans proposed by Debtors and RREF, the contentious nature of these proceedings, the costs of these proceedings to date, and the likely costs if the parties are permitted to amend their respective plans, RREF submits that it would be in the best interests of creditors, equity holders and other parties in interest for the Court to appoint a neutral chapter 11 trustee.

25. Allowing or requiring the parties to amend their plans and the litigation that would ensue as a result of such amendments would be costly, inefficient, futile (with respect to a

plan proposed by Debtors), and not in the best interests of creditors. The expected costs of drafting and litigating amended plans will likely extinguish any equity available to pay Debtors' creditors and equity holders. The Court should appoint a chapter 11 trustee forthwith.

26. In the Court's order denying confirmation, the Court provided notice to all parties that, on August 19, 2014, it would consider whether to appoint a chapter 11 trustee. Accordingly, no further notice of RREF's Motion or this amendment is necessary or required and RREF requests that the Court consider RREF's Motion, as amended, at the August 19 hearing. Accordingly, pursuant to Federal Rule of Bankruptcy Procedure 9014, RREF requests that the Court schedule a hearing on RREF's Motion on an expedited basis.

CONCLUSION

For the foregoing reasons and those set forth in its Motion, RREF respectfully requests that the Court hold an expedited hearing on this Motion, immediately appoint a chapter 11 trustee, and grant such other and further relief as the Court deems just and proper.

[SIGNATURE ON FOLLOWING PAGE]

Respectfully submitted, this 15th day of August, 2014.

Respectfully submitted,

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ROHRIG INVESTMENTS, LP, *et al.*,) Case No. 13-53483-bem
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CARTEL PROPERTIES SPALDING)
WOODS, LLC and)
525 MORELAND AVENUE, LLC,)
)
Respondents.)

)

CERTIFICATE OF SERVICE

This is to certify that I have this day served a copy of **RREF BB ACQUISITION, LLC'S AMENDED MOTION FOR APPOINTMENT OF A CHAPTER 11 TRUSTEE AND REQUEST FOR EXPEDITED HEARING ON AUGUST 19, 2014 AND JOINDER IN THE UNITED STATES TRUSTEE'S MOTION FOR APPOINTMENT OF TRUSTEE** by depositing a true and correct copy in the United States Mail with sufficient postage affixed thereto to assure first class delivery and properly addressed as follows:

SEE ATTACHED DISTRIBUTION LIST

This 15th day of August, 2014.

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